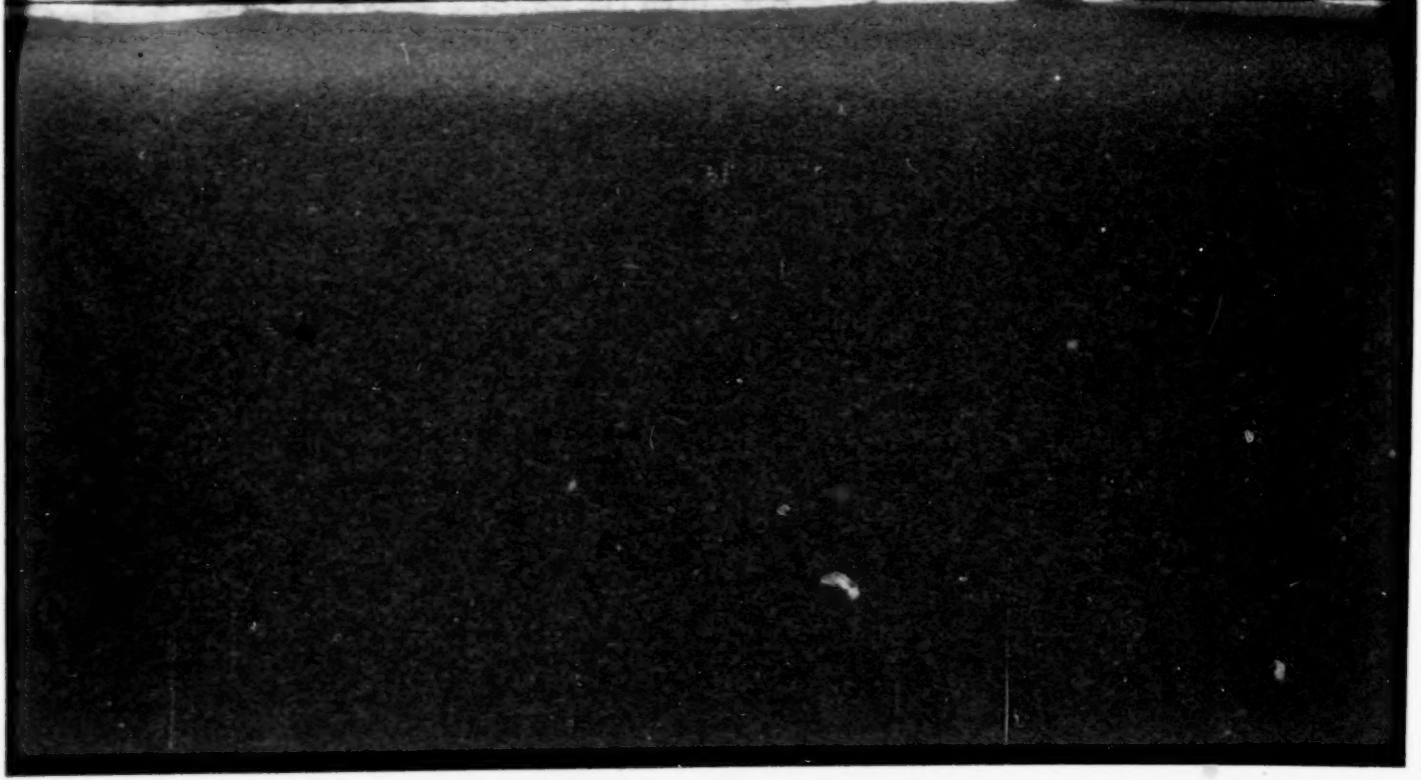

Supreme Court of the United States.

OCTOBER TERM, 1905.

IN EQUITY.

No. 11, Original.

STATE OF LOUISIANA, COMPLAINANT,

vs.

STATE OF MISSISSIPPI, DEFENDANT.

OPPOSITION OF THE STATE OF LOUISIANA TO AMEND THE FINAL DECREE AS TO COSTS.

Now comes the State of Louisiana, through Walter Guion, Attorney-General of said State, and F. C. Zacharie and John Dymond, Jr., Associate Counsel, original complainant in this cause and defendant in this motion, and with leave of this Honorable Court, now files the following opposition to the amendment of the decree of this Honorable Court, dated April 23, A. D. 1906, which motion seeks to amend the judgment so "that the costs of this suit be borne equally by the complainant and defendant."

Complainant and opponent in this motion sets forth the following reasons for said opposition. The question involved herein is one of mingled fact and law.

I.

The citation by movers in the motion from Vol. 2 Daniels' Ch. P. & P., page 1165, has no application to the question at issue here, but refers to costs in boundary questions between private individuals and only lays down the rule in such private litigation that "where, however, it does not appear to have been owing to any default, either in the plaintiff or defendant, that the lands have been mixed or confounded, the Court will direct the costs to be borne by plaintiff and defendant equally; though the interest of one party is more inconsiderable than the interest of the other," authorities cited in note, Norris vs. Lanier, 3 Atk. 82. It is apparent that it has no application to the case at bar. On a preceding page (1376) the same author while stating "the giving of costs in equity is entirely discretionary," further states, "all that is meant by this *dictum*, that the giving of costs in equity is entirely discretionary, is, that the Court is not, like the ordinary courts, held inflexibly to the rule of giving the costs of the suit to the successful party; but it will, in awarding costs, take into consideration the circumstances of the particular case before it, or the situation or conduct of the parties, and exercise its discretion with reference to those points." He further says that costs are not regarded as a penalty or punishment, "but as a necessary consequence of a party having created litigation in which he has failed."

It is alleged in said motion that the bill in this cause "was filed to carry out an agreement to prosecute a friendly suit in this Court for the settlement of the boundary in question." Opponents distinctly submit that that suit is not a friendly suit as alleged by movers in this motion. Although on page 15 of the record the *quasi*-commission and committee on the part of Mississippi suggested that "it is apparent that the only hope of settlement is a friendly suit in the Supreme Court of the United States and we respectfully suggest that course," yet the State

of Mississippi through its duly authorized officers claimed that any such agreement was without authority, and repudiated it on the part of the State of Mississippi.

The suit was no sooner filed, than the State of Mississippi, Defendant, filed a demurrer to the jurisdiction of this Honorable Court, and resisted the trial of the cause, and in said demurrer they set forth, as appears on page 67 of the record,

"Ninth. Because it appeared from the face of said bill of complaint that the acts therein complained of are not the acts of the State of Mississippi in its sovereign or corporate capacity, nor acts of any of her officers, committed by her authority, but the acts of certain individual persons engaged in the oyster and fish trade, against whom relief is sought and who are not made parties herein.

"Tenth. Because it appears upon the face of said bill that the State of Mississippi, or any officer of said State authorized by law to act for and on her behalf, has not in any manner whatsoever denied or controverted the boundary line of the State of Louisiana in the waters to the south of the State of Mississippi and to the southeast of the State of Louisiana."

And in the course of the examination of Governor Vardaman of the State of Mississippi, record page 1798, he stated that neither the Governor of the State nor the commission pretending to act on behalf of the State of Mississippi had any authority to enter into any agreement in regard to the subject matter. And on page 1800, he distinctly denies that the former Governor, A. H. Longino, had any authority to appoint the commission which suggested this suit. And on page 1806, he again denied that any such action was binding upon the State of Mississippi. We cannot find on page 14 of the opinion of this Honorable Court as cited by the movers in this motion, nor anywhere else in the opinion of the Court, any declaration that this was a friendly or amicable suit, but on the contrary, as we have already shown, it was anything but a friendly

or amicable suit and the bringing of it was stubbornly resisted by the State of Mississippi, Defendant, in its demurrer.

II.

It is contended by movers in this motion that "it is a firmly settled rule of this Court that in boundary questions between states, the costs are to be equally divided." This proposition opponents especially deny except when applied to the expenses of the commission to be hereafter appointed for the establishment of the marks and bounds, so as to indicate the boundary. To this effect only will the principle of the division of the costs apply. Nor do the authorities cited by movers in this motion bear out the contention set up by them except in a few cases where the peculiar circumstances developed in the case, led to a decree for a division of the costs. But these circumstances were such as to differentiate the cases widely from the case at bar.

The general rule is stated in Couch vs. Millard, 41 Hun. (N. Y.) 212. "It was the rule of the Civil Law that *victis victori in expensis condemnatus est*, and this is the general rule adopted in the Court of Chancery as well as in courts of Law, at least to the extent of throwing it upon the failing party to show the existence of circumstances to displace the *prima facie* claim to costs given by success of the party who prevails."

This is the rule adopted by the courts of Louisiana under the Civil Law: "In an action of boundary, the costs should be equally divided between the parties unless there is proof of demand on one side and refusal on the other to settle the boundary amicably." Tircuit vs. Pelanne, 14 La. Ann. 215. As was the fact in the case at bar in which Louisiana made every attempt to settle the dispute amicably and Mississippi refused so to do.

"Where defendant in an action to fix a boundary, denies the

necessity of the action, costs follow the judgment for plaintiff." Gaude vs. Williams, 47 La. Ann. 1325; 17 So. Rep. 844.

In 7 How. 661, cited by movers in rule, the costs were divided between the States of Iowa and Missouri equally, but the facts were peculiar. The controversy seems to have grown out of an ambiguity in the acts of Congress as to whether the rapids described in the act were the rapids in the river Des Moines or the Mississippi River, although the Act of Congress spoke of the rapids in the river Des Moines, and the Court decided that there were no rapids in the river Des Moines and went behind the Act of Congress and established the boundary line at the old Indian boundary. The controversy thus proceeded out of a misdescription in the Act of Congress and it was therefore only just and equitable that the costs should be divided, neither State being in fault as to its construction of a doubtful clause in the Act of Congress.

In Missouri vs. Iowa, 160 U. S. 688, a division of costs was decreed, that is, the costs of the commissioners "incident to the marking and establishment of this line shall be paid by the States of Missouri and Iowa equally." This principle, we admit as applicable to the costs of a commission hereafter to be appointed in the case at bar for the establishment of the line by metes and bounds.

In Nebraska vs. Iowa, 143 U. S. 370, the Court decreed that "the costs of this suit will be divided between the two States, because the matter involved is one of those governmental questions in which each party has a real and vital, and yet not a litigious interest." This was a case of avulsion, and seems to have been a suit by amicable consent to settle a doubtful question of boundary. The case at bar is not a governmental question, that is, it is not a question whether Louisiana shall exercise jurisdiction over the territory, but is of a litigious character as your Honors say on page 15 of the opinion, "and that controversy involved to each State pecuniary values

of magnitude, as is shown by the evidence on both sides." Thus this cause does not alone consist of governmental exercise over the territory in dispute, but embraces a large pecuniary value, and is therefore a litigitious case.

In Missouri vs. Iowa, 165 U. S. 144, the decree was one confirming a report of commissioners and the costs of the commissioners in establishing the marks, metes, and bounds of the boundary line, were equally divided between the two States.

Tennessee vs. Virginia, 190 U. S. 64, was one confirming the report of commissioners in fixing the boundary line between the two States, but nothing is said about which State or both States should pay the costs of the commission, although it is to be presumed that, as in similar cases, the costs were to be divided between the two States.

Encyclopaedia of Pl. & Pr., Vol. 5, page 186: "*Prima facie*, the prevailing party in cases in equity, as at law, is entitled to receive costs, and it is desirable to depart as little as possible from the rules of law on this subject; but the unsuccessful party may show circumstances to defeat this right," and authorities cited in note 5. It seems to us that the Statutes of the United States cover fully this question.

U. S. Revised Statutes, 2d Ed. 1878, Section 983, page 184: "The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials whereby law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such tax bills shall be filed with the papers in the cause." Act 26 of February 1853, Chap. 80, Section 3, Vol. 10, page 168. The Liverpool Packet, 2nd S. P. R. 37; Lyell vs. Miller, 6 McC. 432.

U. S. Statutes at Large, Chap. 105, page 344: "There shall be taxed against the losing party in each and every cause pend-

ing in the Supreme Court of the United States and the Court of Claims of the United States, the cost of printing the record in such case, which shall be collected, except when the judgment is against the United States, by the clerk of said Courts respectively, and paid into the Treasury of the United States, but this shall only apply to records printed after the first of October next." This act was passed in 1877.

III.

Movers in this motion base their application partly for relief and for a division of the costs on another ground "because the Court has decreed to complainant only a fractional portion of the relief prayed. The final decree denies to complainant an area of water territory claimed many times larger than the land area unsuccessfully claimed by the Defendant." With all due respect to opposing counsel, we cannot appreciate how the fact that the Court does not continue the line of boundary of Louisiana through Cat Island Sound as far south as the channel between the Chandeleur Islands and the mainland, can affect at all the question of costs, inasmuch as the State of Mississippi can have no interest whatsoever in that portion of the decree because the southern boundary of Mississippi is nearly forty miles distant from the Chandeleur Sound, and the controversy which was at issue here only pertained to and included the question of the islands lying between the main coast of Louisiana, that is, the Parish of St. Bernard, and the southern shore and boundary of the State of Mississippi; and to all intents and purposes, the judgment of this Honorable Court has settled and decided all the contentions advanced by the State of Louisiana.

We therefore submit that the motion herein made by the State of Mississippi to divide the costs should be denied, and

that the decree of this Honorable Court should stand as rendered on April 23, 1906.

That decree awarded to Louisiana all of the costs in this litigation and is now final, and the application for a rehearing having been denied, it is, in our opinion, too late to attack as this motion does, a portion of the decree. If such an attack could be made upon the decree for costs, it should have been made in the application for a rehearing or by an application to this Honorable Court to amend the judgment of this Honorable Court in regard to costs.

All of which is respectfully submitted,

WALTER GUION,

Attorney-General of the State of Louisiana.

F. C. ZACHARIE,

JOHN DYMOND, JR., *Associate Counsel.*

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 12, Original.

STATE OF LOUISIANA, COMPLAINANT,

vs.

STATE OF MISSISSIPPI, DEFENDANT.

Application for Leave to Demur.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 12, Original.

STATE OF LOUISIANA, COMPLAINANT,

versus

STATE OF MISSISSIPPI, DEFENDANT.

Application for Leave to Demur.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the State of Mississippi, one of the United States of America, by A. H. Longino, Governor, and Monroe McClurg, Attorney General, humbly prays leave to file the sworn demurrer herewith presented, to the bill of complaint in the above entitled cause.

It is humbly represented that in the bill of complaint filed in this court upon the *ex parte* application of the Governor and Attorney General of said State of Louisiana without notice, it is alleged that, because of the matters and things therein set forth, there is a dispute between

the said State of Louisiana and the State of Mississippi as to the boundary line between said States in the waters to the south of the said State of Mississippi, and the southeast of said State of Louisiana; the prayer of said bill is as follows:

> "And after due proceedings may it please your Honors to adjudge and decree that the boundary line dividing the States of Louisiana and Mississippi, in the waters between the said States to the south of the State of Mississippi, and to the southeast of the State of Louisiana is the deep water channel, commencing at the most southern junction of the eastern mouth of Pearl River with Lake Borgne, thence by the deep water channel through Lake Borgne, north of Half Moon Island through Mississippi Sound, north of Isle a'Pitre through Cat Island Pass Channel, southwest of Cat Island through Chandeleur Island Sound, northeast of the Chandeleur Islands to the Gulf of Mexico, as is delineated on the original map submitted by the Louisiana Boundary Commission to the Mississippi Boundary Commission, and now made part of this bill marked Exhibit "E," that the said deep water channel be located throughout its course and permanently buoyed at the joint expense of the two States, that the State of Mississippi and its citizens be perpetually enjoined from disputing the sovereignty and ownership of the State of Louisiana in the said land and water territory south and west of said boundary line, and your orator prays that she may be allowed her costs in this cause expended, and that she may have all such other further and general and equitable relief as the nature of the case may require."

All of which will appear by reference to the said bill of complaint on file with this Honorable Court.

Your petitioner, the State of Mississippi, by her Governor and Attorney General aforesaid, humbly submits to your Honors that, because of the insufficiency and fatal defects of the said bill of complaint indicated by the aforesaid demurrer, even if all of the material and well pleaded allegations of the said bill should be confessed, the said

bill would be ,nevertheless, dismissed on the hearing and that in such case the rule of procedure in this honorable court is to sustain a demurrer and dismiss the bill of complaint.

Kansas v. Colorado, 185 U. S., 126 (145).

Louisiana v. Texas, 176 U. S., 1 (13 et. seq.).

It is humbly submitted that by the most casual examination of the said bill of complaint it will be observed that the boundary line between said States is definitely and permanently fixed by law, at three leagues from the Louisiana coast, and at six leagues from the Mississippi shore, and farther, that there is nothing in said bill contained showing a controversy between said States justiciable in this court.

Wherefore, your petitioner humbly prays leave to file her said demurrer and that a day may be fixed by your Honors for the hearing of the same. And as in duty bound your petitioner will ever pray.

MONROE McCLURG,
Attorney General of Mississippi.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 12, Original.

STATE OF LOUISIANA, COMPLAINANT,

versus

STATE OF MISSISSIPPI, DEFENDANT.

DEMURRER.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 12, Original.

STATE OF LOUISIANA, COMPLAINANT,

versus

STATE OF MISSISSIPPI, DEFENDANT.

DEMURRER.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The demurrer of the State of Mississippi, defendant, above named, by A. H. Longino, Governor, and Monroe McClurg, Attorney General, of said State of Mississippi, to the bill of complaint of the State of Lousiana by William W. Heard, Governor, and Walter Guion, Attorney General, of said State of Louisiana.

The defendant, the State of Mississippi, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are set forth and alleged, demurs thereto and for cause of demurrer shows:

First. Because it doth not sufficiently appear in and by the said bill of complaint that the same was filed or is being prosecuted by the authority of the State of Louisiana, or by the authority of any law whatsoever. The said Governor and Attorney General hath no authority in law to proceed in this matter of their own motion.

Second. This court has no jurisdiction of this cause, because it appears from the face of the bill that the matters complained of do not constitute, within the meaning of the Constitution of the United States, a controversy between the States of Louisiana and Mississippi as to their boundary line, in the waters to the south of the State of Mississippi, and to the southeast of the State of Louisiana.

Third. Because it appears from the face of the bill that the boundary line between said States in the waters to the south of the State of Mississippi, and to the southeast of the State of Louisiana are clearly, definitely and permanintly fixed by the several Acts of Congress referred to and pleaded by the complainant in her said bill admitting the Said States into the Union; that of Louisiana at three leagues from the coast, that of Mississippi at six leagues from her shore; that it is impossible for said lines to conflict upon either land or water.

Fourth. It appears from the face of said bill that the complainant, the State of Louisiana, has not attemped to mark and define by buoys, or otherwise, her boundary line in the waters to the south of the State of Mississippi and to the southeast of the State of Louisiana.

Fifth. Because it appears upon the face of said bill that the action of the Governors of said States in appointing so called commissioners to determine the water boundary line between the said States, and the alleged action and recommendation of the so called commissioners, or of any of them, was without authority of law as to fixing the boundary line between said States and in no wise binding upon either of said States in their sovereign or corporate

capacity, and it clearly appears that it was not so intended. Jurisdiction cannot be conferred by consent.

Sixth. Because said bill shows upon its face that this suit is in reality for, and on behalf of, certain individuals who reside in the State of Louisiana engaged in taking oysters and fish along the coast of said States, and that although the suit is attempted to be prosecuted for and in the name of the State of Louisiana, said State is in fact loaning its name to said individuals, and is only a nominal party to said suit' that the real parties in interest are the said private individuals and persons residing in said State and interested in the oyster and fish trade.

Seventh. Because it appears from the face of said bill that the Governor and Attorney General of the State of Louisiana are seeking to maintain in the sovereign right of said State, this suit for the redress of the supposed wrongs of certain private citizens of said State, namely, those engaged in the oyster and fish trade, while under the Constitution of the United States and the laws enacted thereunder said State possesses no such sovereignty as empowers her to bring an original suit in this court for such purpose.

Eighth. Because it appears upon the face of said bill that no property rights of the State of Louisiana are in any manner affected by the matters alleged in the said bill; nor is there any such property right involved in this suit as would give to this court original jurisdiction of this cause.

Ninth. Because it appears from the face of said bill of complaint that the acts therein complained of are not the acts of the State of Mississippi in its sovereign or corporate capacity, nor acts of any of her officers, committed by her authority, but the acts of certain individual persons engaged in the oyster and fish trade, against whom relief is sought and who are not made parties herein.

Tenth. Because it appears upon the face of said bill that the State of Mississippi, nor any officer of said State

authorized by law to act for and on her behalf, has not in any manner whatsoever denied or controverted the boundary line of the State of Louisiana in the waters to the south of the State of Mississippi and to the southeast of the State of Louisiana.

Eleventh. Because it clearly appears from the face of the said bill of complaint that its purpose is to extend, vary and change, by judicial procedure, the boundary lines between said States in the waters to the south of the State of Mississippi, differently from where they were clearly and permanently fixed by the several Acts of Congress referred to and pleaded in the said bill admitting said States into the Union.

Twelfth. Because it appears upon the face of said bill of complaint that the alleged confusion as to the boundary line between the said States in the waters to the south of the State of Mississippi, and to the southeast of the State of Louisiana, and the alleged threat of an armed conflict between the civil officers of the Parish of St. Bernard, in the State of Louisiana, and of the County of Harrison, in the State of Mississippi, is but a conclusion of the pleader, the facts producing such confusion and threat not being set out in the bill as required by law.

Wherefore, and for divers other good causes of demurrer in the said bill, this defendant demurs thereto and humbly demands the judgment of this court whether she shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with her costs and charges in the matter most wrongfully sustained.

MONROE McCLURG,
Attorney General of Mississippi.

THE STATE OF MISSISSIPPI, }
HINDS COUNTY. }

Personally appeared before me the undersigned Clerk of the Supreme Court of the State of Mississippi, A. H. Longino, the Governor of said State, and Monroe McClurg, the Attorney General of said State, representing the said State of Mississippi, defendant, in the above entitled cause, and say that the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

Sworn to and subscribed before me this the 8th day of January, 1903.

A. H. LONGINO, GOVERNOR.
MONROE McCLURG,
ATTORNEY GENERAL.

{ SEAL }

E. W. BROWN,
Clerk of the Supreme Court af Mississippi.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

MONROE McCLURG,
Attorney General of Mississippi.